UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LLOYD LAVERN KNAPP, Defendant.	No. **CR01-3021 MWB** **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

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I. INTRODUCTION

The defendant Lloyd Lavern ("Knapp") was indicted on June 8, 2001, on charges of conspiracy to distribute marijuana, possession of marijuana with the intent to distribute, and possession of firearms while being an unlawful user of controlled substances and after having been convicted of a misdemeanor crime of domestic violence. (*See* Indictment, Doc. No. 1) On August 23, 2001, Knapp filed a Motion to Suppress (Doc. No. 11). On August

29, 2001, Knapp filed an Amended Motion to Suppress (Doc. No. 13), and on September 4, 2001, he filed a supporting brief (Doc. No. 14). The plaintiff (the "Government") filed its response on September 10, 2001 (Doc. No. 19). Pursuant to the Trial Scheduling and Management Order entered September 3, 2001 (Doc. No. 7), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition.

On September 18, 2001, the motion to suppress came on for hearing before the undersigned. Assistant United States Attorney C. J. Williams appeared for the Government. Knapp appeared in person with his attorney, Assistant Federal Public Defender Priscilla Forsyth. The Government offered the testimony of Officers Jason Stiles and Tiffany Creekmur, both of the Mason City Police Department. Knapp offered the testimony of Ann Duff. Knapp introduced into evidence three exhibits, all of which were admitted without objection, to-wit: Defense Exhibit 1, a copy of the application for search warrant at issue in this case; Defense Exhibit 2, a copy of the search warrant issued pursuant to the application; and Defense Exhibit 3, a copy of the magistrate's endorsement to the search warrant. The court has reviewed the evidence and the parties' briefs, and now considers this matter to be fully submitted and ready for decision.

II. FACTUAL BACKGROUND

Except for one central matter, the relevant facts are undisputed. On December 28, 2000, Knapp was shoveling the walkway to his house in Mason City, Iowa, when a thirteen-year-old neighbor girl began yelling profanities at him. Knapp's friend, Ann Duff, was helping him shovel the walkway. Knapp asked Duff to call the police and report the

teenager's behavior.[1] Officers Stiles and Creekmur responded to the call. According to the police dispatch logs, Officer Stiles arrived at the Knapp residence at 7:54 p.m., and Officer Creekmur arrived four minutes later, at 7:58 p.m. Officer Stiles opened the screen door and knocked on the inner door. Duff opened the inside door. Stiles testified that when Duff opened the inside door, he immediately smelled a very strong odor of marijuana coming from inside the residence. Duff testified that, to her knowledge, no marijuana had been smoked inside the residence that day. Duff said the only smell in the house was from a scented candle (vanilla or blueberry) that had been used in the house several hours earlier. This is the central factual dispute in the case.

Officer Stiles asked to speak with Knapp. Duff responded that Knapp had gone to the gas station, and would be back in a few minutes. Officer Stiles said the police had received a call from Knapp, and Duff told the officer she did not know why the police had been called (which was untrue), and the officer would have to wait until Knapp returned. Officer Stiles asked to wait inside the house, but Duff told the officer he would have to wait in his car. When Duff started to shut the door, Officer Stiles put his foot in the door and told her he smelled marijuana burning inside the house, and he was going to get a search warrant.[2] Duff denied there was any smell of marijuana coming from the house and indicated the officer was mistaken. Officer Stiles then entered the house. A short time later, Officer Creekmur arrived at the house. She testified she also could detect the smell of marijuana inside the house.

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[1]Duff testified at the hearing that she called the police at about 3:30 p.m. Police dispatch logs reflect that the call was actually made at about 7:30 p.m. For purposes of the suppression issue, this discrepancy is immaterial.

[2]Officer Stiles said he told Duff he was going to get a search warrant. Duff testified the officer said, "We have a search warrant coming." Although the court sees no material difference between these two statements, the court accepts Officer Stiles's version.

The officers then conducted a "protective sweep" of the house to see if anyone else was present. Nothing illegal or unusual was discovered during the protective sweep. A short time later, other officers arrived and secured the scene. Officer Stiles then left and obtained a search warrant from a state court magistrate. The "Abstract of Testimony" included in the search warrant application contained the following typed language:

> On 12-28-00, I was dispatched to 504 S. Tyler to talk to Knapp about a thirteen year old neighbor girl who was yelling profanity and calling Knapp names. I went up to the door and knocked. A female, later identified as, Annie Duff, answered the door to tell me that Knapp went to Wareco and would be back shortly. As Duff was telling me this, I could smell a very strong odor of burning marijuana coming from the inside of the residence. Duff told me I could wait out in my vehicle for him and I asked her if I could wait inside. Duff told me that I couldn't and then began to close the door. I propped the door open with my foot and told Duff that I was going to get a search warrant to search the residence for marijuana.

Defendant's Ex. 3. The magistrate found probable cause existed to issue the warrant, and issued a search warrant for a search of Knapp's residence. The magistrate wrote the following additional language on the endorsement to the search warrant: "Officer states marijuana smell overwhelming and completely obvious & currently being used. 2 1/2 years' experience law enforcement dealing with marijuana and other drugs."

When Officer Stiles returned to the Knapp residence with the search warrant, the officers conducted a search and discovered marijuana, paraphernalia, firearms, and ammunition. Knapp seeks to have this evidence suppressed, arguing the warrant was obtained with false or misleading information and was not supported by probable cause, and therefore the evidence was seized in violation of the Fourth Amendment to the United States Constitution. He argues the warrant application was defective because Officer Stiles failed to inform the magistrate that the officers had not found, during their protective sweep of the house, any drugs, paraphernalia, or other evidence that marijuana had been smoked.

The court specifically finds Officers Stiles and Creekmur smelled marijuana coming from the house, and reasonably believed marijuana recently had been smoked in the house. The court also finds Officer Stiles sought and obtained the search warrant based on this reasonable belief.[3]

III. ANALYSIS

A. Standard of Review

The United States Supreme Court has set the standard for review of a search warrant application, as follows:

> [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli [v. United States,]* 309 U.S. [410,] 419, 89 S. Ct. [1509,] 590[, 21 L. Ed. 2d 637 (1969)]. "A grudging or negative attitude by reviewing courts toward warrants," *[United States v.] Ventresca*, 380 U.S. [102,] 108, 85 S. Ct. [741,] 745, [13 L. Ed. 2d 684 (1965)], is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant [and] "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, [380 U.S.] at 109, 85 S. Ct. at 746.
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> . . . . Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362

[3]The house had been searched by Mason City police about a month before this incident in connection with marijuana charges against Knapp. However, Officer Stiles had no knowledge of the earlier search, and was at the house solely to respond to the neighborhood dispute.

> U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697 (1960). *See United States v. Harris*, 403 U.S. 573, 577-583, 91 S. Ct. 2075, 2079-2082, 29 L. Ed. 2d 723 (1971). [FN10]
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> [FN10] We also have said that "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," *Ventresca, supra,* 380 U.S. at 109, 85 S. Ct. at 746. This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Illinois v. Gates, 462 U.S. 213, 236-37 & n.10, 103 S. Ct. 2317 & n.10, 2331, 76 L. Ed. 2d 527 (1983).

Thus, the scope of this court's review of the search warrant in this case is limited to a determination of whether the magistrate had a "substantial basis" to issue the warrant. In conducting this review, the court is mindful that

> affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law have no proper place in this area." *Ventresca, supra,* 380 U.S. at 108, 85 S. Ct. at 745. . . . [M]any warrants are – quite properly . . . issued on the basis of nontechnical, common-sense judgment of laymen applying a standard less demanding than those used in more formal legal proceedings.

Gates, 462 U.S. at 235-36, 103 S. Ct. at 2331. As the Supreme Court further explained:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the

> magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States*, 362 U.S. [257,] 271, 80 S. Ct. [725,] 736[, 4 L. Ed. 2d 697 (1960)]. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does [the prior legal standard].

Gates, 462 U.S. at 238-39, 103 S. Ct. at 2332. *See also United States v. Fulgham*, 143 F.3d 399, 400-01 (8th Cir. 1998) ("When we review the sufficiency of an affidavit supporting a search warrant, great deference is accorded the issuing judicial officer. *See United States v. Day*, 949 F.2d 973, 977 (8th Cir. 1991).").

B. Probable Cause to Support the Warrant

The first question is whether there was probable cause to support the issuance of the warrant. The United States Supreme Court has held that when the odor of a forbidden substance is detected by an officer qualified to know the odor, that basis may justify issuance of a search warrant. *Johnson v. United States*, 333 U.S. 10, 13, 68 S. Ct. 367, 368-69, 92 L. Ed. 436 (1948). Eighth Circuit decisions are in accord. *See United States v. McCoy*, 200 F.3d 582, 584 (8th Cir. 2000); *United States v. Neumann*, 183 F.3d 753, 756 (8th Cir.), *cert. denied,* 120 S. Ct. 438 (1999); *United States v. Caves*, 890 F.2d 87, 90 (8th Cir. 1989) (citing *Johnson, inter alia*). The magistrate reviewing the warrant application specifically noted Officer Stiles's law enforcement experience in crediting his statement that a strong marijuana odor was detected coming from the Knapp residence. The court finds the warrant application contained sufficient facts upon which the magistrate could determine probable cause existed.

The inquiry could end here. However, in the event the District Court finds probable cause did not exist for issuance of the warrant, the court also finds the search was proper

because the officers relied in good faith upon a properly issued search warrant. The court will discuss this finding further.

C. Leon Analysis

If the officers executing the search warrant reasonably and in good faith relied on the warrant, then evidence obtained from the search should not be suppressed. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*, 468 U.S. at 922-23, 104 S. Ct. at 3420 (citations and footnote omitted). As the United States Supreme Court noted in *Leon*:

> It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. [Citations omitted.]

Id., 468 U.S. at 923 n.24, 104 S. Ct. at 3420 n.24.

Thus, if serious deficiencies exist either in the warrant application itself (*e.g.*, where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," *id.*, 468 U.S. at 923, 104 S. Ct. at 3421 (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)), or in the magistrate's probable cause determination, then the *Leon* good faith exception may not apply. As the *Leon* Court explained:

> Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search.
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> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

Leon, 468 U.S. at 914-15, 104 S. Ct. at 3416 (internal citations omitted). The Court noted that good faith on law enforcement's part in executing a warrant "is not enough," because "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Leon*, 468 U.S. at 915 n.13, 104 S. Ct. at 3417 n.13 (citing *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964), and *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 23 134 (1959)).

A warrant may be "invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances." *Leon*, 468 U.S. at 914, 104 S. Ct. at 3416. Nevertheless, under *Leon*, the exclusionary rule should not be applied to exclude evidence as a means of punishing or deterring an errant or negligent magistrate. The Supreme Court found that penalizing officers who act in good faith on a warrant for a magistrate's error in issuing the warrant "cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921, 104 S. Ct. at 3419. The relevant question is whether law enforcement actions were objectively reasonable; *i.e.*, whether "the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 918, 104 S. Ct. at 3418. The *Leon* Court noted:

> As we observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S. Ct. 2357, 2365, 41 L. Ed. 2d 182 (1974), and reiterated in *United States v. Peltier*, 422 U.S. at 539, 95 S. Ct. at 2318:
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> > "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The *Peltier* Court continued, *id.* at 542, 95 S. Ct. at 2320:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer

> had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Leon, 468 U.S. at 919, 104 S. Ct. at 3418-19.

The court cannot say the officers executing the search warrant at issue here either had knowledge, or properly could be charged with knowledge, that the warrant was not supported by probable cause. The court has specifically found, *infra*, that Officer Stiles applied for the search warrant on the good faith belief that he smelled marijuana burning inside the Knapp residence. The magistrate who reviewed the warrant application agreed the officer's belief supported issuance of the warrant. The officer, therefore, could not be charged with knowledge that the warrant was invalid in any manner. The warrant itself was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923, 104 S. Ct. at 3421.

Thus, even if the warrant were not supported by probable cause, the court finds the evidence should not be suppressed.

D. Franks Analysis

Knapp claims the officers committed two separate violations of the principles announced by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). *Franks* is the landmark decision allowing a defendant to challenge the veracity of an officer's sworn statement used in obtaining a search warrant. The case requires the court to hold a hearing "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause[.]" 438 U.S. at 155-56, 98 S. Ct. at 2676. Further, and relevant to Knapp's claim here:

> In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 156, 98 S. Ct. at 2676.

Knapp claims Stiles lied to the magistrate about detecting the smell of marijuana coming from the house. The court has found, as a matter of fact, that Stiles's testimony on this subject was truthful. Accordingly, this contention must fail.

Knapp also claims Stiles's affidavit was false because Stiles failed to advise the state court magistrate that no evidence of marijuana possession or use was discovered during the officers' "protective sweep" of the house. The officers both testified the protective sweep was just that – a search to ensure the officers' safety by determining whether any other persons were in the house. Although they did not intentionally ignore routine observations of their surroundings, they were not searching for evidence of marijuana use during the protective search. The court finds Stiles's failure to tell the magistrate nothing incriminating was found during the protective search is irrelevant and does not constitute the type of misrepresentation in an affidavit that was contemplated by *Franks*.

IV. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections[4] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C)

[4]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466,

and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Knapp's motion to suppress be **denied**.

IT IS SO ORDERED.

DATED this 20th day of September, 2001.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).